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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 802.

JOHN C. LEWIS, AS RECEIVER OF THE HANCOCK NATIONAL BANK OF SPARTA, GEORGIA, *Petitioner,*

vs.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR PETITIONER.

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BRIEF FOR PETITIONER.

I.

OPINIONS BELOW.

The trial court filed no opinion in this case, but its findings of fact and conclusions of law are set forth in the Record, pages 11 to 14, inclusive. The opinion of the Circuit Court of Appeals is reported in 67 Fed. (2d) 961.

II.

JURISDICTION.

This Court has jurisdiction of this case under Judicial Code Sect. 240 (a), as amended by the Act of February 3, 1925; Title 28 U. S. C. A., Sect. 347, having granted on March 19, 1934, writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit to review the judgment of that court in this case (R. 35). The judgment of the Circuit Court of Appeals to be reviewed was entered December 7, 1933. (R. 26)

III.

STATEMENT OF THE CASE.

On July 6, 1928, the Governor of Georgia appointed Hancock National Bank of Sparta, Georgia, a State depository, for a term of four years, in which monies collected for State taxes should be deposited, and required the bank to give a fidelity bond in the sum of $10,000. (R. 5 and 6.)

On July 12, 1928, the board of directors of Hancock National Bank, to make effective the appointment of said bank as a State depository, authorized its president to execute a bond in the sum of $10,000. (R. 7.) On the same date the bank, as principal, and the Fidelity and Deposit Company of Maryland, as surety, executed a bond to the Governor of Georgia, and his successors in office, in the sum of $10,000 (reciting the appointment as a State depository and its acceptance), conditioned for the faithful performance of all duties as should be required of the bank by the General Assembly or laws of Georgia, and to account for all public money or effects that might come into its hands during its continuance in office. (R. 6 and 7.)

Thereafter, on July 31, 1928, the Governor issued an order that the Tax Collector of Hancock County pay over to said bank all monies collected by him on account of State taxes, except such as might be paid directly into the State treasury. (R. 8.)

The Hancock National Bank became insolvent, and on May 23, 1932, the Comptroller of the Currency appointed W. K. Howard receiver of said bank. On the date of the appointment of the Receiver the amount of State tax funds on deposit was $6,157.41. (R. 13.)

On July 28, 1932, the Fidelity & Deposit Company of Maryland paid to the State the amount of its deposit in the closed bank with interest, and took an assignment of the right and interest of the State, together with any preferences or liens it might have on account of the funds deposited with the Hancock National Bank. (R. 13.)

Upon refusal of the Receiver to recognize any lien or preference claimed by the surety company on account of said deposit and the depository bond given by said bank, the surety company, as subrogee and assignee of the rights of the State of Georgia under the said depository bond, filed suit in equity in the Superior Court of Hancock County, Georgia, against W. K. Howard, in his capacity as Receiver of said national bank, seeking to establish a lien, ranking in priority from the date of the execution of said bond, on all of the property of said bank and the proceeds of all assets coming into the control of said Receiver to the amount of the State's balance on deposit in the bank at the time of the Receiver's appointment. This suit was removed to the United States Court.

Plaintiff in said suit based its claim of lien on Sections 1252 and 218 of the Code of Georgia, as construed by the Supreme Court of Georgia. (See Par. 10 of respondent's bill, R. 3.)

The material parts of these Code sections are as follows:

> "Each of said depositories shall, before entering upon the discharge of their duties, by their proper officers, execute a bond, with good and sufficient securities, to be fixed and approved by the Governor. Said bond shall be conditioned for the faithful performance of all such duties as shall be required of them by the General Assembly or the laws of this State, and for a

faithful account of the money or effects that may come into their hands during their continuance in office * * * and said bonds shall have the same binding force and effect as the bond required by law to be given by State treasurers, and in case of default, shall be enforced in like manner. * * *

Sect. 1252, Park's Ann. Code of Ga.

"* * * all the property of the treasurer to the full amount of said bond, and the property of the securities to the amount for which they may be severally bound, shall be liable for the faithful performance by the treasurer of the duties of his office, from the date of the execution of said bond; and a lien is hereby created in favor of the State upon the property of the treasurer to the amount of said bond, and upon the property of the securities upon his said bond to the amount for which they may be severally liable, from the date of the execution thereof."

Sect. 218, Park's Ann. Code of Ga.

(The Georgia Code sections cited are set forth in full in the appendix.)

The Receiver filed his motion to dismiss plaintiff's petition, asserting: (1) The lien sought to be established is invalid; (2) there is no equity in the petition; (3) the execution of the bond was beyond the charter power of a national bank, without authority of law and contrary to public policy; (4) the execution of said bond did not create a valid lien in favor of the State on the assets of said bank. (R. 10.)

The trial court sustained the motion and entered a judgment dismissing the petition insofar as it sought to establish a lien upon the properties of the bank in the hands of said Receiver, but retained the petition for the sole purpose of allowing plaintiff to establish its claim as a general creditor. (R. 11.)

A stipulation by the Receiver in open court admitted all allegations of the petition except the claim of lien (Court's finding of Fact, R. 12); whereupon, the District Court en-

tered its final decree denying the lien contended for and allowing plaintiff's claim in the amount of $6,206 as a general creditor. (R. 14.)

From this final decree plaintiff appealed to the United States Circuit Court of Appeals for the Fifth Circuit. (R. 15.) The Circuit Court of Appeals reversed the judgment of the District Court on December 7, 1933 (R. 19), and decided that the surety company is entitled to the lien it seeks on all the bank's assets in the hands of the Receiver. (R. 19.)

While said case was pending in the Circuit Court of Appeals on a stay of mandate W. K. Howard died, and John C. Lewis, as Receiver of said bank (petitioner here), was substituted for the said Howard as a party in said case in the Circuit Court of Appeals. (R. 33.)

John C. Lewis, as Receiver, then filed his petition to this Court for a writ of certiorari to review the judgment of the Circuit Court of Appeals, and certiorari was granted March 19, 1934. (R. 35)

IV.

ASSIGNMENTS OF ERROR.

(1) The Circuit Court of Appeals erred in deciding in substance and effect that the statutes of Georgia declaring a lien on all the property of a State depository bank from the date of the depository bond are valid as applied to a national bank qualifying as a State depository.

(2) The Circuit Court of Appeals erred in deciding that a national bank has power to give a general lien on all of the property of the bank to secure a deposit of State funds.

(3) The Circuit Court of Appeals erred in deciding that the lien prescribed by the statutes of Georgia in the case of a depository bank is enforceable against the bank's property of all kinds in the Receiver's hands.

(4) The Circuit Court of Appeals erred in construing Sects. 1252 and 218 so as to create a valid lien on all assets

of a national bank in Georgia—a lien existing from the time of the execution of the depository bond, but sleeping and innocuous until insolvency, when it becomes awakened, and attaching to all assets of every character in the hands of the receiver, destructive of the rights of common creditors.

V.

SUMMARY OF ARGUMENT.

(1) A lien in favor of the State, declared by the statutes of Georgia to arise upon the execution of the State depository bond, is invalid and void as applied to a national bank, whether it be construed as arising on the date of the bond but ineffective until a receiver is appointed, or construed as arising on the date of the bond and binding all the property of the bank from that date.

(2) The lien as construed by the United States Circuit Court of Appeals is nothing more than a preference or priority, and violates Sects. 91 and 194 of Title 12, U. S. C. A., prohibiting preferences and providing for ratable distribution on insolvency.

(3) The lien as construed by the Supreme Court of Georgia binds and affects all the property of the bank from the date of the bond, and as so construed is invalid and void as applied to a national bank, because it impairs the functions of the bank as an agency and instrumentality of the National Government.

(4) State statutes can neither extend nor limit the powers of a national bank, and it is beyond the powers of a national bank, as measured by the Federal statutes, to give the lien as construed by the United States Circuit Court of Appeals, or the lien as construed by the Supreme Court of Georgia.

(5) When a national bank is designated a State depository and it gives a bond to secure State deposits, no lien whatever is intended or arises, as the bond required of a national bank is different from the bond required of a state bank.

VI.

ARGUMENT.

Lien Invalid Under Any Construction.

The Circuit Court of Appeals takes the view that since the national bank was not required to accept the appointment as a State depository nor give a personal bond, its making bond, referring to its appointment under the statute, establishes contractually the statutory lien.

Neither the appointment nor the bond expressly provide that the State shall have a lien. Whether the lien is considered as arising contractually, on the theory the State statute is written into the bond, or as created by the State statute, the questions presented are the same, to-wit: The validity of the statute as applied to national banks and the power of national banks to give the statutory lien. Relevant provisions of the National Banking Act must be written into the bond as well as State statutes. (Davis vs. Elmira Savings Bank, 161 U. S. 275, 287.)

It is our view that the lien declared by the State statute is equally invalid and ineffective as to the receiver of an insolvent national bank, whether it is construed as intended to be effective and operative only on the appointment of a receiver, or as intended to bind and affect the property of the bank from the date of the bond.

If the first construction be the correct one, then the so-called lien loses its character as a lien and becomes a priority, and so conflicts with the provisions of the National Banking Act prohibiting preferences and providing for ratable distribution among creditors, 12 U. S. C. A., Sects. 91 and 194. (See appendix.) If the second construction be correct, as contended by the surety, then the lien binds all the property of the bank from the date of the bond to the amount of the bond, and is a lien beyond the power of a national bank to give, and beyond the power of a state legislature to authorize, as such a lien will necessarily impair

the functions and efficiency of a national bank, an agency and instrumentality of the Federal Government.

2.

Lien Invalid as Construed by the U. S. Circuit Court of Appeals.

It is the Circuit Court of Appeals' construction that the lien is not intended to affect the commercial assets while the bank is a going concern, but as to such assets becomes effective on the appointment of a receiver. This construction, however, of Sects. 1252 and 218 of the Code of Georgia, declaring a lien on the property of a depository bank, is in conflict with the construction given those sections by the Supreme Court of Georgia.

While it is true that the State courts were called upon to construe the sections in cases arising after the insolvency of *state* banks, there is nothing in the decisions of the State courts to indicate that a distinction is made between real estate and other assets, nor is there anything to indicate that the lien is not effective as to commercial assets while the bank is a going concern.

We point out with particularity the following language of the State court decisions:

> "Plaintiffs in error contend that the state has no lien on the notes, accounts and choses in action of said bank, because under our law a judgment fixes no lien on such property, and no levy and sale thereof can be had at law. The reply is, that upon the execution of the bond, the law gave the state a lien upon all the property of the bank; not upon such property only as a judgment would fix a lien upon; not upon such property only as is subject to levy and sale; but upon all the property of the bank. Are not notes and accounts property? Can any reason be given why it is not competent for the legislature to give a lien upon notes and accounts, as well as upon any other property?"
>
> Seay et al. vs. Bank of Rome et al., 66 Ga. 609, 614.

"We think they were bound to know of the existence of this lien; the law created the lien and expressly provided that it should exist, from the time of the execution of the bond, upon all the property of the principal and sureties; and everybody must take notice of this; the law gives them this notice."

Simpson & Ledbetter vs. Mathis, Sheriff, 79 Ga. 159, 161.

"To the granting of this order the State excepted. Were the notes in question assets of the bank upon which the State's lien takes effect, without reference to the liability of the bank to the makers of these notes for amounts justly due them, respectively, on their deposits? We think not. On the contrary, in our opinion, these notes were assets only in so far as there might be due to the bank balances upon them after deducting the amounts of the respective deposits, if those deposits were made bona fide while the bank was engaged in the transaction of its regular business and had control of its books."

State vs. Brobston, Receiver, 94 Ga. 95, 97.

The Circuit Court analogizes the depository lien to a Georgia chattel mortgage on a stock of merchandise; but it will be noted that the law of this State in regard to such chattel mortgage expressly provides:

"* * * in which case the lien is lost on all articles disposed of by the mortgagor up to the time of foreclosure, and attaches to the purchases made to supply their place." (Georgia Code of 1910, Sect. 3256. See appendix.)

As to a chattel mortgage on a stock of goods, when the Legislature intended that the lien should be lost on the goods disposed of and should attach to those acquired, it expressly said so. We see nothing in the State depository law which authorizes the court to write into it a provision which the Legislature has seen fit to leave out.

The same criticism may be made of the lower court's analogy to a judgment lien, the Code of Georgia expressly

relieving choses in action from the lien of and seizure under a judgment. (Code of Georgia, Sect. 5948. See appendix.)

However, assuming, without conceding, that this is a correct construction of the State statute, it means the State has no security in the case of a national bank until insolvency, as far as the bank's commercial assets are concerned; that is, such assets as money, notes, accounts, securities, choses in action and the like, which constitute the bulk of the valuable assets of a national bank.

The following language of this Court is apposite here:

> "We have already said that the judgment created a lien, now it is of the very nature and essence of a lien, that no matter into whose hands the property goes, it passes cum onere; if this were not the case, it would cease to be a lien."
>
> Burton vs. Smith, 13 Peters, 464, 483.

In short, the effect of the statute, as so construed, is to give the State a preference or priority on insolvency.

In the case of Collins vs. New Hampshire, 171 U. S. 30, on page 34, this Court said:

> "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect."

The lien having the effect of giving the State a preference on insolvency and preventing ratable distribution, it necessarily conflicts with Sects. 91 and 194, U. S. C. A., Title 12.

Referring to Sect. 194 U. S. C. A., Title 12, this Court, in the case of Cook County National Bank vs. U. S., 107 U. S. 445, 450, pointed out:

> "This section provides for the distribution of the entire assets of the bank, giving no preference to any claim except for moneys to reimburse the United States for advances in redeeming notes."

If the assets to be distributed are assets belonging to the bank, under Sect. 194 they must be distributed ratably; and for any claimant to receive more than a ratable distribution, he must show a title in the property to be distributed, either legal or equitable, in which case it is not a distribution of the assets of the bank, but a return to the claimant of something that is his. Unless the Georgia statutory lien is such as gives to the State a present existing and continuing interest or title in the property of the bank from the date of the bond, it has nothing to be returned to it, and the National Banking Act, the paramount law, prohibits any distribution to it or its assignee other than a ratable distribution.

The State's lien on the commercial assets of a bank, as construed by the Circuit Court of Appeals, takes hold of nothing, but lies sleeping upon the threshold of insolvency, ready to arouse and seize all the bank owns the moment the receiver enters that threshold. But that moment is too late in the case of a national bank, because the receiver enters under the protection of the National law, which shuts the door on the then awakening lien. (12 U. S. C. A. 91.)

Pertinent here is the language of this Court in the case of Davis vs. Elmira Savings Bank, as follows:

> "Nor is the repugnancy between the state statute and the act of Congress removed by the contention that inasmuch as ratable distribution applies only to that which belongs to the bank, therefore there is no conflict between the state statute and the act of Congress. This argument can only mean that the effect of the state statute is to make the Savings Bank, in the event of insolvency of the National Bank, the owner of a sum equivalent in amount to the sum of money which was by it deposited. But to say this aggravates the conflict between the state law and the act of Congress. If the state statute is to be read as saying that whenever the persons named therein deposit money with a national bank they shall be treated as

> the owner of an equal sum of the assets of the bank when it becomes insolvent, then the state statute precludes, in a most flagrant way, the possibility of the ratable distribution ordered by the act of Congress."
>
> Davis vs. Elmira Savings Bank, 161 U. S. 275, 288.

The statement in the opinion of the court below (R. 24) that "The creation by means of a bond of a lien against the entire assets of a State bank for a debt due the United States was upheld in United States v. Robertson, 5 Pet. 641", is answered by the following excerpt from Note 1 of the opinion of this court in Texas & Pacific Railway v. Pottorff, Receiver of the First National Bank of El Paso, decided February 5, 1934: "United States v. Robertson, 5 Pet. 641, and Planters Bank v. Sharp, 6 How. 300, have no application to the National Banking Act."

3.

Lien Invalid as Construed by Georgia Supreme Court.

The statutes here under consideration, as construed by the State courts, create a lien on every asset of the bank of every character from the date of the bond. There is no separation, no half-way ground; no specific property can be said to be affected while other assets escape.

See:

> Seay vs. Bank of Rome, 66 Ga. 609;
> Simpson & Ledbetter vs. Mathis, 79 Ga. 159;
> Mathis vs. Morgan, 72 Ga. 517;
> State vs. Brobston, Receiver, 94 Ga. 95.

What then is the necessary effect of such statutes on the function of a national bank? The bank cannot sell the property it is authorized to acquire and dispose of under Title 12 U. S. C. A., Sects. 24 and 29, for no one would take it subject to a lien to the amount of the bond. Even the dividends the bank may declare under 12 U. S. C. A., Sect. 60, will be subject to the lien. How shall a national bank

dispose of stock it acquires under 12 U. S. C. A., Sect. 83, which it is required to sell within six months from the date of purchase, if there is a lien attached to it? The very bonds a national bank is required to deposit with the Treasurer of the United States, under 12 U. S. C. A., Sect. 90, would be subject to the lien of the State if the lien declared by the State law is effective, thereby destroying the function of the national bank as a depository of public money of the United States and a financial agent of the Government.

Is it possible to conceive a lien being required on every asset of a bank except in contemplation of insolvency and to prevent the application of the bank's assets pro rata to its creditors? In fact, the Supreme Court of Georgia, in the case of Mathis vs. Morgan, 72 Ga. 517, on page 522, said in effect that the bond was required "in apprehension that the Governor might make a mistake in its (the bank's) solvency." Does not such a lien clearly offend against 12 U. S. C. A., Sect. 91?

How can a national bank procure an issue of circulating notes after the lien of the State attaches to the bonds it must deposit with the Treasurer of the United Sates as provided in 12 U. S. C. A., Sect. 101? Is it thinkable that the Treasurer of the United States must accept bonds subject to a lien? How can the bank maintain a reserve or pledge collateral with the Federal Reserve or other banks in the ordinary course of its banking business, if its money and collateral are subject to a lien of the State? Was it ever contemplated that the money deposited by a national bank under Sect. 121 of Title 12 U. S. C. A., to be used for the redemption of its circulating notes, shall be subject to a lien of the State? (The relevant part of sections of the National Banking Act cited above are quoted in the appendix.)

A consideration of the foregoing questions makes it clear that a state statute creating a lien from the date of the bond is in conflict with many provisions of the National

Banking Act and violative of its spirit and purpose, and, as applied to a national bank, is void.

> "National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a State, to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties, for the performance of which they are created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court.
>
> Davis vs. Elmira Savings Bank, 161 U. S., 275, 283

See also:

> First Nat. Bank of San Jose vs. California, 262 U. S. 366, 67 L. Ed. 1030.

4.

Lien is Ultra Vires.

It is established by the repeated decisions of this Court that the National Banking Act constitutes a complete system for the establishment and government of national banks, and provides everything essential to the winding up and distribution of their effects, neither limited nor enlarged by other statutory provisions, state or Federal, with respect to the settlement of demands against insolvent banks; and that Federal statutes alone constitute the measure of authority of such banks; and they cannot exercise any power except those expressly granted and such as are necessary for the purpose of carrying into effect the powers expressly granted.

See:

Cook County Natl. Bank vs. U. S., 107 U. S. 445
Farmers & Mechanics Natl. Bank vs. Dearing, 91 U. S. 29
Logan Natl. Bank vs. Townsend, 139 U. S. 67
Easton vs. Iowa, 188 U. S. 220.

There is no provision in the National Banking Act giving a national bank the express power to give a lien on all of its assets of every kind and character to secure a deposit of State funds, whether such a lien be construed as effective from the date of the bond or as effective only upon the appointment of a receiver for the bank.

This Court in two recent decisions established beyond further controversy that a national bank did not have the power to secure either private or public deposits by a pledge of assets prior to the amendment to the National Banking Act approved June 25, 1930.

Texas & P. R. Co. vs. Pottorff, 78 L. Ed. 514; Advance Opinions, October Term, 1933, No. 7.
Marion vs. Sneeden, 78 L. Ed. 521; Advance Opinions, October Term, 1933, No. 7.

It necessarily follows that if a national bank did not have the power prior to June 25, 1930, to pledge specific assets to secure public deposits, it did not have the power to give a lien on all of its assets, including assets to be acquired in the future, for the purpose of securing public deposits.

The bond, the execution of which respondent contends had the effect of giving a lien to the State on all the assets of the bank, was executed July 12, 1928, and was therefore ineffective to create or carry with it the lien declared by the Georgia sfatutes.

The bond given by the bank in July, 1928, and the lien declared by Georgia statute as incident thereto, under the recent decisions of this Court above recited are ultra vires,

absolutely void and a mere nullity; in short, contrary to the public policy of the United States.

The amendment of June 25, 1930, is not a curative or confirmatory statute, and therefore does not have the effect of validating prior ultra vires contracts that may come within the scope of its provisions. But the validity of the bond and the incident lien declared by State statute depends on the state of the law at the time the bond was executed. In short, the amendment of June 25, 1930, would be ineffective to validate the bond and the lien claimed as incident thereto, even if the amendment could be construed as authorizing liens of the character declared by the statutes of Georgia, as construed either by the Supreme Court of Georgia or by the Circuit Court of Appeals.

> "It is, of course, the law in force at the time the transaction is consummated and made effectual, that must be looked to as determining its validity and effect."
>
> Memphis Railroad Co. vs. Commissioners, 112 U. S. 609, 623.

See also:

Schaun vs. Brandt, 116 Md. 560, 82 A. 551.
Anthony vs. Household Sewing Machine Co. (R. I.) 5 L. R. A. 575
Charles H. Steffey, Inc. vs. Bridges, 140 Md. 429, 117 A. 887, 888.
International Products Co. vs. Vails Estate (Vt.) 123 A. 194, 197 (7)
People vs. Nixon, 229 N. Y. 356, 128 N. E. 245 (5)

Even if the amendment of June 25, 1930, could be construed as authorizing, after June 25, 1930, the lien declared by the Georgia statute, as construed either by the State court or by the Circuit Court of Appeals (which we deny), there is nothing in the record to show that the bank did anything tantamount to a re-execution or reaffirmance of the bond subsequent to June 25, 1930. In fact, the record

does not justify even the assumption that State funds were deposited in the bank subsequent to June 25, 1930, because the order or instruction of the Governor to the county tax collector was to deposit in said bank the money collected by him on account of State taxes, except such as may be paid directly into the State treasury. (R. 8.) The record is silent as to whether any monies were deposited in the bank subsequent to June 25, 1930, or whether all tax monies collected thereafter were paid directly into the State treasury. But we submit that the mere acceptance of deposits of State tax money subsequent to June 25, 1930, would not be tantamount to a re-execution of the bond, or sufficient in itself to show a confirmation or ratification of the bond, or any intent on the part of the bank to give the State a lien on all of its assets.

Independent of any view that may be taken as to the effect of an amendment in 1930 on an ultra vires act of 1928, we submit that the amendment of June 25, 1930, does not authorize or empower a national bank to give a lien on all of its assets, both presently owned and acquired in the future, to secure deposits of public funds.

The amendment reads as follows:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safe-keeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."
>
> Act of June 25, 1930, Chap. 604, 46 Stat. at L.; U. S. C. Title 12, Sect. 90.

We think the language of the amendment, considered in the light of the Senate and House reports on the amendment, clearly shows that it was the intent of Congress to authorize the pledge of specific collateral or giving a surety bond to secure deposits of public money of a State or politi-

cal subdivision thereof, and that it was not contemplated or intended to authorize liens on all the assets of a national bank.

"In Senate report No. 67, 71st Congress, 2nd Session, the Committee based its favorable report upon a letter from the Attorney-General of Minnesota, reading in part as follows:

> 'The United States district court of this district has held that it may not thus pledge its assets to secure private deposits and the trend of authority generally seems to be to the effect that a bank may not in any case pledge its assets to secure a deposit unless authorized by law so to do. The national banks of this State have pledged with the State and the various subdivisions thereof millions of dollars in Government and other bonds as security for public deposits. They are anxious to be permitted to do so, and we are willing that they should. Under the law as it now stands we may be taking a chance in accepting such pledges from the national banks, and we should like to have the chance removed by legislation in Congress which will specifically authorize such pledges by national banks.'

"From House report No. 1657, 71st Congress, 2nd Session, it appears that the committee reported favorably upon the bill because of a request from the Secretary of the Treasury, reading in part as follows:

> 'While the office of the Comptroller of the Currency has consistently taken the position that national banks have the right to give security for the safe-keeping and prompt payment of public moneys of the State or political subdivisions thereof deposited with such national banking associations, several recent decisions have thrown some doubt on this question with the result that in some States the State banks may secure the public deposits, but the officers of the State are in doubt about depositing with the national banks in the absence of any specific law by Congress on the subject. It would be extremely helpful, therefore, if it is possible for your committee to report out, and the House pass, S. 486.'"

(The foregoing from Baltimore & O. R. Co. vs. Smith, 56 Fed. (2d) 799, 802.)

From the foregoing extracts from the Senate and House committee reports on the amendment of 1930, it appears that what Congress had before it was the suggested want of authority in a national bank to pledge specific assets or give specific security such as the Comptroller had theretofore considered valid. It was the purpose of the amendment to authorize national banks to pledge specific collateral as security for the deposit of funds of States and their political subdivisions, and there is no suggestion that Congress intended to validate all the various and sundry lien laws then of force in the various States, or that may thereafter be prescribed by the various legislatures of the forty-eight States.

We think it cannot be assumed that the Comptroller of the Currency ever understood or considered that national banks in Georgia, by giving surety depository bonds, were giving a lien on all their assets to the State to secure its deposit. This is evidenced by the fact that the law providing for State depositories and declaring a lien has been in existence since 1879, and in that period there have been many national bank failures in this State, but there is no reported case or record showing that the State or any surety on its depository bond attempted to assert a lien against a national bank or considered it had such a lien. Furthermore, the bond required of a national bank was double that required of a state bank, so the Comptroller may safely have assumed that all the incidents and effects of the execution of the bond in the case of a state bank did not follow in the case of a national bank. In fact, it cannot even be assumed that national banks in this State generally gave a depository bond and that the Comptroller necessarily approved thereof, because under the law of this State since 1893 a national bank may qualify as a State depository by depositing with the State Treasurer United States bonds or Georgia State bonds.

The amendment provides that the association may, *upon the deposit with it of public money of a State or any political subdivision thereof*, give security, etc. This langauge clearly indicates that Congress was authorizing security that the bank may give at the time the money is deposited —security of a specific value, which the depositor may take and hold for the safe-keeping and prompt payment of the money deposited. Likewise, when the money is repaid to the depositor, the security is returned to the bank, and the security varies with the deposits made.

Certainly Congress did not intend that a national bank may give a lien on all of its assets dating from the date of the execution of the depository bond and for the amount of the bond, regardless of the deposits made. One day the deposits may be $1,000 and another day the deposits may be $6,000. But regardless of the deposit, the State, under the Georgia law, has a lien on all of the assets of the bank. We do not think the language of the amendment, "of the same kind as is authorized by the law of the State in which the association is located, in the case of other banking institutions in the State," has the effect to extend the authority of a national bank to give any lien that the State law may declare as arising from a deposit of State funds or the execution of a depository bond; but rather Congress meant the pledging or depositing with the State of specific property of the form and character required of state banks by State law, or the giving of a surety bond free of any liens or incidents that may be declared by a State law to attach thereto. In short, we think it was the intent of Congress to authorize such security as inhered in the thing given and not the incidents that may be declared by State statute to attach to the security deposited. State laws quite generally require a deposit with a designated officer of certain specific types of bonds, such as bonds of the State or bonds of the political subdivisions or municipalities, and most generally bonds of the United States, or, as is frequent in

depository laws of the States, plain surety bonds unentangled with liens, preferences or priorities.

Construing the language of the amendment as it ordinarily would be understood and contemplated, the words "give security" would not be considered as including the giving of a lien on all or unidentified property, or the giving of a preference or priority upon insolvency.

If the words "give security * * * of the same kind as is authorized by the law of the State" could be said to ordinarily include liens, preferences and priorities, certainly the amendment would not be given that effect when it is considered in the light of the entire National Banking Act and the many other provisions of the Act with which a lien or preference law would conflict.

The lien declared by State statute, as construed by the Circuit Court of Appeals, as we have heretofore pointed out, is nothing more than a preference or priority, and is in conflict with the equal distribution sections of the National Banking Act (12 U. S. C. Sects. 91 and 194). Certainly Congress did not intend to modify or change those sections for the benefit of States and their political subdivisions, or to permit a State a preference or priority.

To authorize the lien contended for by respondent in this case, which is the lien as declared by the Supreme Court of Georgia, would place the State and its surety in a position superior to that of the United States, and have the effect of seriously impairing, if not totally destroying the functions and usefulness of a national bank. Certainly Congress did not authorize or permit such a lien when it passed the amendment of June 25, 1930.

> "A thing may be within a statute but not within its letter, or within the letter and yet not within the statute. The intent of the law maker is the law."
>
> Jones vs. Guaranty Indemnity Co., 101 U. S. 626

> "The court will not be prevented from giving effect to a legislative intention of which it is satisfied by a

too rigid adherence to the very word and letter of the statute."

Barrett vs. Van Pelt, 268 U. S. 85, 69 L. Ed. 851 (1)

"All laws are to be given a sensible construction, and a literal application of the statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose."

U. S. vs. Katz, 271 U. S. 354, 70 L. Ed. 986, 988

We think there is a vast difference between pledging specific property, even though the property pledged is of greater value than the money deposited, and a lien on the entire property of a bank; and, likewise, a vast difference between a pledge of specific collateral and a preference or priority. If the bank gives what is really a valid general lien, depositors and others deal with the bank at their peril; whatever they acquire from the bank may be claimed under the general lien. If this became generally known, depositors would not want to deal with the bank while there was a general lien outstanding on all of its property; and for the bank to give such a lien unknown to its unsecured depositors, is to deal with them unfairly, which, when discovered, would result in a lack of confidence in the bank to its injury. To provide for a preference or priority results in unequal and unfair dealing with general depositors.

On insolvency a creditor with specific collateral is limited in his advantages to the collateral he holds. If it shrinks and becomes less than the debt, as to the difference he must share pro rata with unsecured creditors; while a creditor holding a general lien, preference or priority, takes all the assets in the receiver's hands, if necessary, to pay his debt. If the lien, preference or priority does not consume all assets held by the receiver when they shrink in value, the reduction in the pro rata to unsecured creditors is multiplied by the relatively greater portion going to the lien creditor. A general lien, preference or priority defeats

completely the equal distribution provisions of the National Banking Act and runs counter to the whole spirit and purpose of the Act. This alone, we think, is sufficient to render untenable a construction of the amendment that would include liens, preferences, or priorities; and we are confident that this Court will hold that such liens, preferences or priorities were not contemplated or intended to be within the power of a national bank.

Further, the long established rule of construction that grants of charter powers will be strictly construed against the corporation and liberally in favor of the public militates against a construction of the amendment that will include either liens, preferences or priorities.

Central Transp. Co. vs. Pullman's Car. Co., 139 U. S. 24, 49

Oregon Ry. Co. vs. Oregonian Ry. Co., 130 U. S. 1, 26

5.

No Lien Attaches to the Bond Required of a National Bank.

Laws creating liens as contended for in this case should be strictly construed, particularly when the rights of third persons (here, common depositors) are involved. Certainly the only bond that can have the effect of creating this all-absorbing lien in any case is the statutory bond prescribed by Sect. 1252. This statutory bond is conditioned "for the faithful performance of all such duties as shall be required of them by the General Assembly or the laws of this State," and to faithfully account, etc., and is to be not less than the amount of the deposit, and under such a bond the State may deposit an amount equal to the bond.

The bond required of a national bank is not such a statutory bond for two reasons:

(1) The first condition of the bond is one the bank cannot make, for it cannot unqualifiedly agree for the State to prescribe its duties or regulate its affairs. (See cases cited above.)

(2) The amount of the bond is double that required by the statute of a state bank. Section 1256 of the Code of Georgia, 1910 (see appendix), provides:

> "* * * and whenever a national bank is selected as a State depository the amount of the bond shall be double the amount of the money to be deposited with it."

The change in the amount of the bond is a very material change, because the statutes prescribe that the lien shall be for the amount of the bond, not the amount of the deposit. Under the statutory bond the depository may receive deposits equal to the amount of the bond, but under the bond required in 1928 of a national bank, it could receive State deposits of only half the amount of the bond. So we say that under a proper construction of the State laws no lien arose upon the execution of the bond by a national bank.

If it is considered that the lien arises by contract, then it is only a valid contract within the purview of the State statutes that could create a valid lien. A national bank certainly cannot make a contract agreeing to perform all such duties as shall be required of it by the General Assembly or the laws of the State. The lower court answers this contention by saying that no duties except to receive and account for public monies had been required of the bank. It is a novel rule to us that an agreement, invalid in its inception, is rendered valid because nothing has been demanded under it. However, the statute contemplates at least one other duty to the State, and that is to keep the Treasurer informed at all times of its financial condition. (Sect. 1254, Code of Georgia, 1910. See appendix.)

The only bond the Governor was authorized to take by the law of Georgia was a bond for double the amount of the deposit. The Circuit Court of Appeals says that the amount of the bond was not double the deposit. Then the Governor violated his authority and the bond contract was not in com-

pliance with the statute, because the statute demands a bond double the amount of the deposit.

CONCLUSION.

If any lien was intended to arise from the execution of a depository bond by a national bank upon its assets, unquestionably such bond and lien to secure deposits of State funds were void at the time the contract was made. It violates the whole plan and spirit of the National Banking Act. It is unfair to general depositors who are entitled to confidently expect that they would be treated equally with all other depositors. Certainly Congress did not by the amendment of June 25, 1930, intend to authorize such a revolutionary and unreasonable invasion by State statutes into the plan and policy of the National Banking Law, or to make national banks subject to State statutes providing for sweeping liens or revolutionary preferences or priorities, merely because they may accept public funds on deposit, such as the lien claimed under Sects. 1252 and 218 of the Code of Georgia, or the recent enactments of the Legislature of this State declaring all public deposits trust funds and providing for a lien on all of the assets of the bank to the amount of the funds deposited. (Act approved March 16, 1933, Sect. 6, Georgia Laws 1933, pages 78, 83. See appendix.)

So we assert without hesitation and with confidence that the judgment of the Circuit Court of Appeals, recognizing and sanctioning such a revolutionary and unreasonable lien as asserted in this case, should be and will be reversed by this Court.

Respectfully submitted,

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APPENDIX.

Sections of the Code of Georgia Cited.

(Park's Annotated Code or Code of 1910)

Sect. 218, Code of Ga. Each security on the bond of the treasurer shall make oath that he is bona fide worth, over and above his debts, exemptions and liabilities of all kind, property in realty and personalty not less than some specified sum to be stated in said oath, which oath shall be attached to said bond, and recorded therewith. He may, by express stipulation in writing, limit his liability to a specific sum to be stated in said bond; and all the property of the treasurer to the full amount of said bond, and the property of the securities to the amount for which they may be severally bound, shall be liable for the faithful performance by the treasurer of the duties of his office, from the date of the execution of said bond; and a lien is hereby created in favor of the State upon the property of the treasurer to the amount of said bond, and upon the property of the securities upon his said bond to the amount for which they may be severally liable, from the date of the execution thereof.

Sect. 1252, Code of Ga. Each of said depositories shall, before entering upon the discharge of their duties, by their proper officers, execute a bond, with good and sufficient securities, to be fixed and approved by the Governor. Said bond shall be conditioned for the faithful performance of all such duties as shall be required of them by the General Assembly or the laws of this State, and for a faithful account of the money or effects that may come into their hands during their continuance in office. Said bond shall be filed and recorded in the executive office, and a copy thereof, certified by one of the Governor's secretaries under the seal of the Executive Department, shall be received in evidence in lieu of the original in any of the courts of this State; and said bonds, shall have the same binding force and effect as the bond required by law to be given by State treasurers, and, in case of default, shall be enforced in like manner. In fixing the bond to be given by a depository under this section, the Governor shall so fix the same as to make it not less than the amount of money entrusted to said depository, and in no case shall a larger amount of money

be deposited in any bank than the amount of the bond, and the Governor may at any time require additional bond, if necessary, to cover fully the amount deposited or intended to be deposited in such bank.

Sect. 1254, Code of Ga. It shall be the duty of the treasurer to keep advised, and to keep the Governor advised from time to time of the financial condition of the various State depositories, as well as of the financial condition and standing of the securities on the bonds of such depositories, and if at any time they should become satisfied of the insolvency of any of the depositories, or that the affairs of any of said depositories are in an embarrassed condition, it shall be the duty of the Governor to direct the treasurer to withdraw the money of the State from such depository, and the Governor may declare the position vacant and may proceed to appoint another bank in the same locality to act as such depository for the unexpired term under the rules and regulations prescribed by law. In case the Governor should be advised of the insolvency of the securities on the bond of any of said depositories, it shall be his duty to notify such depository to strengthen said bond, and if at the end of ten days said bond is not strengthened, the Governor shall declare said office vacant, and proceed to fill the same by new appointment.

Sect. 1256, Code of Ga. The treasurer of this State shall not deposit at any one time, or have on deposit at any one time in any one of the depositories of this State for a longer time than ten days, a sum of money belonging to this State that exceeds the bond given by said depository to the State. The treasurer shall check from any depository the amount of the State's money that said depository holds in excess of its bond, and pay the sum into the treasury; Provided, that a State depository may be allowed to hold a sum greater than fifty thousand dollars, but not in excess of one hundred thousand dollars, upon such depository giving a new bond to cover the maximum amount to be deposited with it, and when such new bond has been executed and delivered to the Governor the old bond shall be discharged and surrendered, and whenever a national bank is selected as a State depository the amount of the bond shall be double the amount of money to be deposited with it. The bond to be made by the State depositories may

be a personal bond or may be made by a deposit with the State treasurer of United States bonds of Georgia State bonds, or either one or both of said methods.

Sect. 3256, Code of Ga. A mortgage in this State is only security for a debt, and passes no title. It may embrace all property in possession, or to which the mortgagor has the right of possession at the time, or may cover a stock of goods, or other things in bulk, but changing in specifics, in which case the lien is lost on all articles disposed of by the mortgagor up to the time of foreclosure, and attaches to the purchases made to supply their place. A mortgage given by a person or corporation to a trustee or trustees, to secure an issue of bonds, shall, when it is expressly so stipulated therein, embrace and cover after-acquired property of such person or corporation.

Sect. 5948, Code of Ga. A judgment has no lien upon promissory notes in the hands of the defendant; nor are choses in action liable to be seized and sold under execution, unless made so specially by statute.

Georgia Laws Cited.

Sect. 6, Act approved March 16, 1933. It shall be the duty of each and every collecting officer and each and every officer to hold public money, upon any money belonging to any public body coming into his hands, promptly to deposit the same in a bank or depository as hereinafter stated. All funds belonging to the State or any of its bureaus, commissions, boards and or departments shall be deposited in some designated State depository. The county authorities shall designate one or more solvent bank or banks as depositories of all county moneys and moneys belonging to the school funds of the county, and of school districts therein, and of other districts therein organized for any purpose; and if the county authorities shall not have provided for such a depository, the county board of education or the trustees of any school district or the proper authorities having supervision over any other public fund may designate such a depository as to their funds; and if there be no applicable depository selected, the officer collecting or holding any public funds may select a depository. The proper authorities shall require the depository to give bond or make deposit of securities in trust to secure such deposits

as may be made in it. Any bank in this State is authorized to give such bond and/or to secure deposits of public funds by deposits of securities; and the proper authorities are authorized to make contracts with depositories as to interest or compensation of the depository. Upon any deposit of public funds being made in any bank, whether designated as a depository or not, there shall arise in favor of the public body to which such fund belongs a lien on all the assets of said bank, superior to all other liens for the amount of such funds. All funds of any public body upon being deposited in any bank shall be deemed to be held as a trust fund. Money of any public body deposited in any bank by any collecting officer or officer to hold public funds, though deposited in his own name, shall, if the account stand in his name in his official capacity or be marked with words or abbreviations showing his official title, or if the bank otherwise knows that it is public money, be deemed to be funds of a public body within the purview of this Act. No proper authority, nor, when the proper authority consists of a board or tribunal, any member of such board or tribunal shall, where acting in good faith, incur any liability by reason of designating any depository or taking any other official action required of such proper authority under this Act.

Georgia Laws 1933, pp. 83, 84.

Sections of the National Banking Act Cited.

Section 24, Title 12, U. S. C. A. (as amended) empowers a National bank to discount and negotiate promissory notes, drafts, bills of exchange and other evidences of debt; and buy and sell investment securities, exchange, coin and bullion.

Sect. 29, Title 12, U. S. C. A. A national banking association may purchase, hold and convey real estate for the following purposes, and excepting as provided otherwise in section 371 of this title, for no others:

First. Such as shall be necessary for its immediate accommodation in the transaction of its business.

Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it.

But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it for a longer period than five years.

Sect. 60, Title 12, U. S. C. A. The directors of any association may, semiannually, declare a dividend of so much of the net profits of the association as they shall judge expedient; but each association shall, before the declaration of a dividend, carry one-tenth part of its net profits of the preceding half year to its surplus fund until the same shall amount to 20 per centum of its capital stock.

Sect. 83, Title 12, U. S. C. A. No association shall make any loan or discount on the security of the shares of its own capital stock nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previouly contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or, in default thereof, a receiver may be appointed to close up the business of the association, according to section 192 of this title.

Sect. 90, Title 12, U. S. C. A., as far as pertinent. All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government: * * * Provided, that the Secretary of the Trea-

sury shall distribute the deposits herein provided for, as far as practicable, equitably between the different States and sections.

Sect. 91, Title 12, U. S. C. A. All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed in this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution, shall be issued against any such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.

Sect. 101, Title 12, U. S. C. A., as far as pertinent. Upon the deposit with the Treasurer of the United States, by any national banking association, of any bonds of the United States in the manner provided by existing law, such association shall be entitled to receive from the Comptroller of the Currency circulating notes in blank, registered and countersigned as provided by law, equal in amount to the par value of the bonds so deposited; * * * Provided, that nothing herein contained shall be construed to modify or repeal the provisions of section 175 of this title, authorizing the Comptroller of the Currency to require additional deposits of bonds or of lawful money in case the market value of the bonds held to secure the circulating notes shall fall below the par value of the circulating notes outstanding for which such bonds may be deposited as security * * *.

Sect. 121, Title 12, U. S. C. A., as far as pertinent. Every national banking association organized under the provisions of this chapter, shall at all times keep and have on deposit in the Treasury of the United States, in lawful money of the United States, a sum equal to 5 per centum of its circulation, to be held and used for the redemption of

such circulation, which sum shall in no case be counted as a part of its legal reserve; * * *

Sect. 194, Title 12, U. S. C. A. From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held.